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In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., RESPONDENTS

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION, CROSS-RESPONDENT

On Writs Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

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BRIEF FOR THE WASHINGTON COUNCIL OF LAWYERS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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QUESTIONS PRESENTED

1. Whether the *Noerr* doctrine immunizes from liability under the antitrust laws a boycott designed solely to persuade the political branches of government to enact legislation, where the boycotters lacked market power—and therefore had no chance of obtaining their goal through economic coercion rather than political persuasion—and in addition were motivated by substantial, bona fide, noneconomic concerns.

2. Whether the First Amendment bars the imposition of antitrust liability upon participants in an expressive boycott where the participants lacked market power and the boycott accordingly could not have harmed competition.

3. Whether, in a case in which proof of market power is required to distinguish an economically coercive boycott from one that is simply politically persuasive, it is permissible to base a finding of market power solely on the fact that the boycott achieved its purpose.

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INTEREST OF THE AMICI CURIAE

The Washington Council of Lawyers ("the Council") is a nonpartisan, voluntary bar association created in 1971. The Council's purpose is to promote the practice of law in the public interest. Its membership includes attorneys from every segment of the Washington, D.C. legal community, as well as law students and members of related professions.

The National Legal Aid and Defender Association ("NLADA") is a private, nonprofit, national membership organization headquartered in Washington, D.C. Its purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons who lack the means to retain counsel. NLADA represents approximately 1775 organizations that provide representation to poor people in civil cases and 735 public defender offices engaged in representing indigent criminal defendants. NLADA's membership includes most of the country's public defender offices and legal services agencies, as well as appointed counsel and other private practitioners.

The Association of Trial Lawyers of America ("ATLA") is a voluntary association of about 60,000 attorneys around the country. ATLA's members primarily represent tort victims and criminal defendants.

Amici each have as one of their principal goals the provision of high-quality legal representation to persons of limited means. They believe that providing adequate compensation for court appointed attorneys is essential if that goal is to be achieved. In the instant case, the members of the Superior Court Trial Lawyers Association attempted to persuade the citizens and government of the District of Columbia that the statutory compensation rates for attorneys appointed to represent indigent criminal defendants were too low to guarantee quality representation. One component of this lobbying campaign was a highly visible refusal to take on new appointed cases. Amici believe that an expressive boycott undertaken for purposes of petitioning the government for redress of grievances is fundamentally different from the covert economic boycotts routinely condemned under the antitrust laws. Amici submit this brief to demonstrate why the antitrust laws and the Constitution should be construed to insulate such expressive boycotts from antitrust liability.[1]

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 36.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case differs substantially from a run-of-the-mill antitrust action, in which the challenged agreement among competitors is covert, has nothing at all to do with the legislative process, and is motivated solely by the desire for economic gain. The conduct that is the target of the Federal Trade Commission's enforcement effort here indisputably lies at the very core of the right to petition government for redress of grievances: a public boycott aimed at the government and intended to focus the attention of both government officials and the public at large on the need for legislation to remedy a pressing public problem—the severe deficiencies in the provision of legal services to indigent defendants in the District of Columbia.

Somewhat surprisingly, the Commission refuses even to recognize—let alone accommodate—the significant First Amendment aspect of the boycott conducted by the Superior Court Trial Lawyers Association ("SCTLA"). The Commission simplistically labels the boycott "price-fixing" (*e.g.*, Br. 14, 16, 23, 24, 32, 35, 42, 43), in the apparent belief that affixing that label will somehow mask the quite different context in which this boycott arose.[2] And it asserts that the Trial Lawyers' direct lobbying effort in no way resembles the conduct protected in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

The antitrust laws obviously have some application to boycotts by those who enter into economic relationships with governmental entities. Even government is entitled to a measure of protection against economic coercion and anticompetitive conduct. At the same time, however, it must be recognized that policy decisions concerning government purchases of goods and services—such as deci-

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[2] In fact, of course, the Trial Lawyers did not engage in price fixing, but rather in a concerted refusal to deal. They did not agree upon a price and indeed accepted the take-it-or-leave-it offer that was presented to them by the District government. Pet. App. 10a, 82a, 204a.

sions regarding the provision of legal services to the poor—frequently have a significant political as well as economic component, especially when those decisions are reached through the political process. That political aspect of the relationship between the District and the Trial Lawyers—and the political context in which the relationship was hammered out—counsels caution lest the antitrust laws be applied in a manner that trenches improperly and unnecessarily on the right to petition government.

These considerations favor an approach that exempts political boycotts from antitrust scrutiny, while preserving regulation of commercial boycotts. Indeed, such an approach is compelled by the *Noerr* doctrine, which immunizes political activity against regulation under the Sherman Act. Two factors are relevant in delineating the class of political boycotts protected by *Noerr*. The first is whether the participants in the boycott exercised market power. A boycott may either persuade or coerce; if the participants lacked market power, "the boycott must have succeeded out of persuasion and been a political activity" and *Noerr* immunity applies. Pet. App. 60a (Silberman, J., concurring). That principle is dispositive in this case, for the Commission has not shown that the Trial Lawyers exercised market power.

Even if the SCTLA could be shown to have had market power, it would be immune under *Noerr* if the motivation of the boycott participants was something other than economic self-interest. If a noncommercial motive predominated, or if the boycott only barely met the market power test and was motivated by a substantial noncommercial motive, the boycott would be protected under *Noerr*.

If antitrust immunity were not available under *Noerr*, it would be required by the First Amendment. Boycotts such as this one clearly qualify as expressive conduct protected by the First Amendment. Government regulation therefore must be narrowly tailored to serve a substantial government interest and may not reach beyond

what is necessary to further that interest. Condemning an expressive boycott without proof of market power, as the FTC did here, violates this standard. A boycott that does not wield market power cannot harm competition; the government's interest in preventing anticompetitive conduct accordingly can be protected fully—and the burden on speech substantially reduced—by requiring proof of market power before an expressive boycott may be condemned under the antitrust laws.

ARGUMENT

I. THE *NOERR* DOCTRINE PROHIBITS THE IMPOSITION OF ANTITRUST LIABILITY IN THIS CASE

This Court held in *Noerr* that—as a matter of statutory construction—the Sherman Act does not reach concerted efforts to restrain trade that involve petitioning of government officials. The Court observed that nothing in the statute's legislative history indicates that Congress intended to regulate political activity and, in addition, a broader construction of the statute would infringe upon the right to petition protected by the First Amendment. 365 U.S. at 137-138; see also *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The Court recently made clear that the availability of *Noerr*'s protection depends on "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 108 S. Ct. 1931, 1936 (1988). Despite this express determination that immunity turns on the precise factual context in which a *Noerr* claim is raised, the FTC proposes (Br. 14-17) several categorical limits on *Noerr*'s reach that would preclude consideration of the facts surrounding the boycott in this case. These limits are wholly unjustified. Contrary to the FTC's assertions, boycotts are not categorically excluded from *Noerr*'s protective umbrella. Rather, as we show below, where an examination of the relevant factors indicates that a boycott aimed at the government is primarily political—rather than primarily

commercial—in nature, that boycott is entitled to *Noerr* immunity.

A. The *Noerr* Doctrine Is Not Limited To Restraints Of Trade That Stem From Government Action, But Also Encompasses Private Restraints Incident To The Exercise Of The Right To Petition

The FTC argues (Br. 15-16) that *Noerr* extends only to restraints of trade that result from governmental action and has no application to wholly private restraints that are incident to the exercise of the right to petition. That crabbed interpretation of the *Noerr* doctrine already has been rejected by this Court.

In its recent decision in *Allied Tube*, the Court recognized that the *Noerr* doctrine has two separate aspects. First, where a challenged restraint of trade results from valid government action, "those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." 108 S. Ct. at 1936. Second, "*where, independent of any government action, the anticompetitive restraint results directly from private action*, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity." *Ibid.* (emphasis added; citation omitted).

The Court applied the latter principle in *Noerr* itself. One of the arguments in that case was that the railroads' publicity campaign by itself violated the Sherman Act, without regard to the effect of any governmental action stimulated by the publicity campaign. The Court rejected the contention, declining to subject such "political" activity to regulation under the Sherman Act. 365 U.S. at 140-141, 143-144. Similarly, the Court in *Allied Tube* did not end its consideration of *Noerr's* applicability when it concluded that the challenged restraint was the result of private, not governmental, action. See 108 S.Ct. at 1938. Rather, the bulk of the Court's opinion ad-

dressed whether *Noerr* immunity extended to this wholly private restraint because the restraint and its effect "were incidental to a valid effort to influence governmental action." *Ibid.*; see *id.* at 1938-1942. The latter discussion was necessary only because the Court has rejected the narrow view of *Noerr* advanced by the FTC here.

B. There Is No "Boycott Exception" To The *Noerr* Doctrine; Boycotts Are Subject To The Same Analysis As Other Private Restraints

The Commission also argues (Br. 15-17) that *Noerr* immunity never extends to a group boycott, regardless of the circumstances surrounding the restraint. This Court has never endorsed that proposition and there is no reason that it should do so here. A boycott should be subjected to the same analysis as any other restraint of trade.

The Court did observe in *Noerr* that a publicity campaign designed to sway public opinion and ultimately influence legislation bears no resemblance to boycotts and other kinds of agreements that often are held to violate the Sherman Act. 365 U.S. at 136. But it did not in any way indicate that the principles set forth in that decision may never apply to any boycott, regardless of the context in which it occurs. Because *Noerr* did not involve a boycott, the Court had no occasion to address the issue.

The FTC's reliance (Br. 16-17) on *Allied Tube* is similarly misplaced. The defendant in that case had argued "that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." 108 S.Ct. at 1938. In the course of rejecting that "absolutist position," the Court listed examples of various types of conduct—including horizontal boycotts—that would be protected if the defendant's extreme approach were adopted. *Id.* at 1938-1939. Significantly, the Court *did not* hold that the sorts of conduct listed could never be eligible for protection under *Noerr*. After setting

forth its list of examples, the Court "conclude[d] that the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." *Id.* at 1939. Far from establishing categorical exclusions from *Noerr*, therefore, the Court simply announced that proof of a restraint's impact on legislation is not by itself sufficient to invoke *Noerr;* analysis of the context and nature of the activity is also required. See *id.* at 1936, 1941 n.10, 1942. *Allied Tube* thus indicates that all restraints are equally eligible for protection under *Noerr*; the applicability of the doctrine depends on an assessment of the particular restraint at issue.

Indeed, a categorical exclusion of the sort hypothesized by the FTC would not make any sense. The *Noerr* doctrine by definition comes into play only when the concerted action in question would otherwise violate the antitrust laws (if there were no antitrust violation, there would be no need for immunity). What basis could there be for extending the doctrine to some categories of antitrust violations and not others? The fact that some boycotts are classified as *per se* violations surely provides no reason for the distinction. *Per se* restraints are not classified as such because they cause greater damage to competition in every case; judicial experience simply justifies the conclusion that they are virtually always unreasonable. See page 25, *infra.* A single restraint held invalid under the rule of reason may inflict more damage upon competition than any number of *per se* violations. Accordingly, it would be much more logical to follow the course outlined in *Allied Tube*: judging *Noerr*'s applicability by utilizing the same standard for all restraints.

Two additional factors would make it especially inappropriate to exclude all group boycotts from *Noerr*'s protective umbrella. First, the scope of the term "group boycott" in this context is not at all clear. The Court has emphasized that "boycotts are not a unitary phenomenon." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 543 (1978). It has recognized that "there is more con-

fusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine," and has concluded that "[s]ome care is therefore necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (citation omitted). The protean nature of concerted refusals to deal—and the resulting murky boundaries of the *per se* rule in this context—counsel against limiting the scope of *Noerr* immunity in the manner suggested by the FTC.

Second, the group boycott has long been accepted in this country as a legitimate and important vehicle for achieving social change. As the court of appeals itself recognized, "boycotts have historically been used as a dramatic means of communicating anger or disapproval and of mobilizing sympathy for the boycotters' cause." Pet. App. 46a; see also *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 911-912 (1982). Among the many examples of boycotts in American history are the refusal of the American colonists to import British goods in order to protest the Stamp and Townsend Acts and the boycott of public transportation by black citizens of Montgomery, Alabama to protest racial segregation. Since Noerr is designed to insulate political activity from antitrust liability, it would make little sense to exclude from its scope a kind of activity that often is used for political purposes.

In sum, boycotts are not and should not be categorically excluded from *Noerr* protection. The availability of *Noerr* immunity with respect to any boycott—including the one in this case—turns upon an assessment of the context and nature of that boycott. It is to that inquiry that we now turn.

C. Examination Of The Nature And Context Of The Trial Lawyers' Boycott Establishes That The Trial Lawyers Are Entitled To *Noerr* Immunity

The threshold inquiry under *Noerr* is whether the challenged conduct was intended to influence governmental

action. See *Allied Tube*, 108 S.Ct. at 1938-1939; *California Motor Transport*, 404 U.S. at 510-511; *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 670 (1965). There can be no doubt that this requirement is satisfied here. The Trial Lawyers clearly initiated the boycott in order to influence the government of the District of Columbia. The boycott was aimed directly at the D.C. government and had the purpose of convincing the citizens and their elected representatives that the compensation of CJA attorneys was inadequate.[3]

Allied Tube directs that once this threshold requirement is satisfied, the "context" and "nature" of the restraint must be examined to determine whether *Noerr* immunity applies. The nature of the SCTLA's boycott and the context in which it occurred together indicate that that boycott should come within the protection of *Noerr*.

1. Noerr *Immunity Applies To The Trial Lawyers' Boycott Because The Boycott Was A Key Element Of A Broad Public Campaign To Lobby The Legislative And Executive Branches Of The D.C. Government*

Activities directed at influencing the political branches of government lie at the core of the conduct protected by the *Noerr* doctrine. In *Noerr* itself, the Court stated (365 U.S. at 137):

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would

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[3] See, *e.g.*, Pet. App. 47a, 79a, 115a; J.A. 183-184 (testimony of Ralph Perotta), 506 (investigational hearing of Reginald Addison), 466-467 (deposition of Roger Pickens).

have no basis whatever in the legislative history of that Act.

The Court concluded for these reasons that the Sherman Act did not regulate a publicity campaign designed to create public support for legislation.

Applying the same principle, the Court reached a different result in *Allied Tube*. Because the challenged conduct in that case "took place within the context of the standard-setting process of a private association," and was therefore one step removed from the political process, the Court held that the defendant's efforts to influence that association should not be given "the same wide berth accorded legislative lobbying." 108 S.Ct. at 1939. The private context in which the conduct occurred weighed against applying *Noerr* immunity. *Id.* at 1939-1941; cf. *California Motor Transport*, 404 U.S. at 511-513 (although *Noerr* extends to petitioning of the judiciary, some conduct that might be acceptable in the political arena may be sanctionable in the judicial forum).

The present case resembles *Noerr* more than *Allied Tube*—the boycott here took place "in the open political arena, where partisanship is the hallmark of decisionmaking." *Allied Tube*, 108 S.Ct. at 1940. The boycott was focused upon the government itself, seeking to gain attention for and redress of the Trial Lawyers' grievances. Indeed, this is a stronger case for *Noerr* immunity because, unlike even *Noerr* (see *id.* at 1938), this case involves direct petitioning of the government. It is difficult to imagine conduct more intimately involved in the political process.

Moreover, the Trial Lawyers' action closely resembles *Noerr* in two other respects. The Court in *Noerr* emphasized the public nature of the defendants' campaign, which involved a broad variety of techniques for soliciting public support, including the use of circulars, speeches, and newspaper and magazine articles. See 365 U.S. at 142-143. In a representative democracy, gaining the public's support is often an essential prerequisite to

persuading the government to adopt a proposal. Concerted activities accompanied by bona fide efforts to win the sympathies of the populace are thus more likely to have a political orientation—and are accordingly more deserving of protection under *Noerr*—than concerted activities conducted outside the public arena that do not depend at all upon public support for the satisfaction of their goals.

The Trial Lawyers engaged in considerable efforts to generate favorable publicity. They conducted press conferences, issued press releases, granted interviews, engaged in nonviolent picketing, passed out pamphlets, and held rallies.[4] These efforts were extremely successful. The boycott received substantial coverage—most of which was favorable—in the local, national, and international broadcast and print media.[5]

A second way in which this case resembles *Noerr* is that the challenged restraint was part of a broader lobbying campaign directed at the political branches of government. See *Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 783, 785 (E.D. Pa. 1957), aff'd, 273 F.2d 218 (3d Cir. 1959), rev'd on other grounds, 365 U.S. 127 (1961). The Trial Lawyers used a variety of means to obtain redress of their grievance through the political process. Aside from the boycott, they testified before the D.C. Council in favor of an increase in compensation rates and conducted an extensive lobbying campaign during which they pled their case to the mayor, his aides, the Chief Judge of the D.C. Superior Court, and key members of the D.C. Council and the

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[4] See, *e.g.*, Pet. App. 47a, 79a; J.A. 225-229 (testimony of Karen Koskoff), 253-254 (Addison testimony), 260-262 (testimony of Nelson Kline), 268-269 (testimony of Joanne Slaight), 461-462, 466-467 (Pickens deposition), 506 (Addison deposition), 523-525 (Koskoff deposition), 914-917 (SCTLA press kit), 918-920 (SCTLA pamphlet).

[5] See J.A. 896-900, 921-954 (newspaper and magazine articles and transcripts of television coverage); see also *id.* at 398-399 (testimony of David Isbell).

United States Senate and their aides.[6] These facts strongly bolster the conclusion that the boycott was simply an additional means of bringing the matter to the attention of the government and the public.

Because the conduct at issue here can only be characterized as direct petitioning of the government, it plainly is "an activity that has traditionally been regulated with extreme caution." *Allied Tube*, 108 S.Ct. at 1940. The context in which the boycott took place accordingly weighs strongly in favor of recognizing *Noerr* immunity in this case. *Allied Tube*, 108 S.Ct. at 1940.

Indeed, some language in *Allied Tube* indicates that this factor is dispositive. The Court there stated that "*at least outside the political context*, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability." 108 S.Ct. at 1941 n.11 (emphasis added in part). Here, where the conduct occurred in the thick of a political battle, there is considerable basis for concluding that *Noerr* applies for that reason alone. The Court need not reach that question, however, because the second factor identified in *Allied Tube*—the nature of the restraint—also weighs in favor of *Noerr* immunity.

2. *The Nature Of The SCTLA's Boycott Indicates That It Is Entitled To* Noerr *Immunity*

In assessing the "nature" of a particular restraint to determine whether *Noerr* immunity applies, the operative dichotomy is between "commercial activity that has traditionally had its validity determined by the antitrust laws themselves" and activity, "[t]he essential character [of which is] * * * political." *Allied Tube*, 108 S.Ct. at 1939, 1940. Boycotts, taken as a class, differ markedly from the restraints in *Noerr* (which the Court found to be "political") and *Allied Tube* (which the Court placed

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[6] See, *e.g.*, J.A. 183 (Perotta testimony), 217-221 (Koskoff testimony) 246-248 (Addison testimony), 792 (letter from Perotta to Mayor Barry).

in the "commercial" category) because they have one foot in each camp. See *Claiborne Hardware*, 458 U.S. at 888 (likening boycotts to "chameleons"). Boycotts in the commercial context have long been scrutinized under the antitrust laws. See, *e.g.*, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914). At the same time, as we have discussed (at 9), boycotts are a well-recognized—and frequently utilized—means of political expression. This Court concluded as much in *Claiborne Hardware*, holding that expressive boycotts are protected by the First Amendment. See 458 U.S. at 907-915.[7]

There are three possible ways in which the "nature" aspect of the *Noerr* inquiry could take account of the dual character of boycotts. The Court could adopt the course of action proposed by the FTC: ignore the political aspect of boycotts and withdraw *Noerr* immunity from all boycotts. But that approach would mean that even a wholly symbolic boycott—for example, five lawyers engaging in a joint vigil/work stoppage in front of the District Building to protest the CJA pay scale—could lead to liability under the Sherman Act. Penalizing such obviously political action is impossible to square with the principles set forth in *Noerr*.

Alternatively, the Court could take the opposite tack, treating all boycotts as political conduct for purposes of assessing the nature of the restraint. As discussed above (at 13), when a boycott takes place in the legislative lobbying context, there is considerable force to classifying it as political activity protected by *Noerr* immunity.

Finally, the Court could reject each of these absolute approaches and instead distinguish boycotts that are essentially political in nature—and therefore eligible for *Noerr* immunity—from those that are essentially com-

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[7] In this respect, boycotts are quite different from other recognized restraints on competition. Price fixing, for example, is not known as a means of political expression.

mercial in nature—and for that reason unprotected. Drawing such a distinction would accommodate the general interest in thwarting anticompetitive conduct with the interests underlying *Noerr*. Dividing boycotts into these groups is not a terribly difficult undertaking. Two factors are relevant: (1) the extent to which the boycott is aimed at persuading, as opposed to coercing decisionmakers, and (2) the extent to which the boycott participants are motivated by reasons other than economic self-interest.

As Judge Silberman observed in his concurring opinion below, a boycott that "coerce[s] the government *qua* economic actor creates a distortion of the market and the political process." Pet. App. 60a. Such a boycott is less "political" than a boycott whose power is limited to its political persuasiveness and whose success therefore could be a result only of prevailing in the hurly burly of the political battlefield.

A basic building block of antitrust analysis—the market power inquiry—provides a useful means of distinguishing between a persuasive boycott and a coercive one. If the participants in a boycott lack market power, "the boycott must have succeeded out of persuasion and been a political activity. But, if there is market power, one must assume, for antitrust purposes, it came into play and that the boycott was primarily commercial." Pet. App. 60a.[8] Where the participants in a boycott aimed at the government lack market power, and therefore lack the ability to coerce, their boycott should be classified as a political one that falls within the protection of *Noerr*.[9]

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[8] One author has concluded that *Noerr* immunity should be extended to boycotts that are predominantly political in nature where an assessment of indicia of market power indicates that the boycott participants did not exercise market power. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 115 (1985).

[9] Using the market power inquiry to determine whether a boycott aimed at the government is persuasive—and hence political—rather

A second criterion that should be considered is whether the participants in the boycott are motivated by concerns other than economic self-interest. This factor comes into play only if the boycott participants possess market power: boycotters who lack market power need not have any non-economic motivation in order to qualify for *Noerr* immunity. The Court has made clear that self-interested boycotts qualify for *Noerr* protection as long as other factors substantiating the political nature of the action are present. *Allied Tube*, 108 S.Ct. at 1941 n.11; *Pennington*, 381 U.S. at 669-670. *Noerr* itself held that "at least insofar as [concerted activity is] directed toward obtaining governmental action, its legality [is] not at all affected by any anticompetitive purpose it may have * * *." 365 U.S. at 139-140.[10]

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than coercive—and thus commercial—has the effect of requiring application of the rule of reason rather than the *per se* rule. This makes perfect sense because the rationale underlying the *per se* rule does not hold if the challenged conduct likely succeeded for political rather than economic reasons. The *per se* rule applies only to restraints of trade that by their very nature have a "pernicious effect on competition" and "lack * * * any redeeming virtue." *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). If there is any doubt about whether a practice "threatens 'the central nervous system of the economy,'" the *per se* rule should not apply. *Broadcast Music, Inc.* v. *Columbia Broadcasting Syst., Inc.*, 441 U.S. 1, 23 (1979) (citation omitted). It is far from clear that all or even most boycotts aimed at government—which have long been an accepted instrument of political discourse—have a pernicious effect on competition and lack any redeeming value. Applying the *per se* rule to such boycotts is therefore unjustified on the *per se* rule's own terms.

[10] A majority of the court of appeals concluded that the absence of a predominant unselfish motivation can by itself be a reason for denying *Noerr* protection. See Pet. App. 41a. It did not indicate how this rule could be squared with *Noerr* and *Allied Tube*, both of which expressly rejected such a notion. And the court's approach—like that advocated by the FTC—leaves no room for self-interested symbolic boycotts that succeed by dint of political persuasiveness rather than economic power. Indeed, the majority did not respond at all to Judge Silberman's telling criticism of its approach and his suggestion that market power provided a relevant

Motivation matters only if the market power inquiry reveals that the boycott has a significant coercive element. In the United States, unselfish motive is closely identified with political activity. The Nation has a long tradition of political activism undertaken for unselfish reasons and this Court itself has indicated that expressive boycotts of this nature contain "elements of majesty." *Claiborne Hardware*, 458 U.S. at 888. For that reason, boycotters who possess market power are entitled to *Noerr* protection if the predominant reason for their boycott is not economic self-interest. This factor explains the result in *Claiborne Hardware*. The boycotters in that case clearly did have market power: they constituted more than three-quarters of the population of Claiborne County. *NAACP* v. *Claiborne Hardware Co.*, 393 So. 2d 1290, 1295 (Miss. 1981), rev'd on other grounds, 458 U.S. 886 (1982). Because their predominant motivation was to stimulate general social and political change, however, their boycott could not be confused with the commercial boycotts that are "normally held violative of the [antitrust laws]" (*Noerr*, 365 U.S. at 136). Lower courts have relied upon analogous facts in finding expressive boycotts protected under *Noerr*. See, *e.g.*, *Missouri* v. *National Org. for Women ("NOW")*, 620 F.2d 1301, 1314-1315 (8th Cir.), cert. denied, 449 U.S. 842 (1980).

In some cases, it may not be clear whether participants in a boycott aimed at the government possess market power or whether their predominant motivation is economic self-interest. In such cases, the Commission and the courts should consider the two factors together. If the boycotters possess some degree of market power, but not an overwhelming amount, then the fact that they have a substantial—though not necessarily predominant—unselfish motivation could tip the balance in favor of viewing their boycott as political, rather than commercial.

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and appropriate criterion for distinguishing between protected and unprotected boycotts. Pet. App. 58a-61a.

Application of these criteria in the present case establishes that *Noerr* immunity is warranted. The current record strongly suggests that the Trial Lawyers lacked market power and that their boycott succeeded because it was politically persuasive, not economically coercive. For example, the participants in the strike were far outnumbered by non-participants who were qualified to accept criminal appointments.[11] Moreover, the record is replete with evidence that the D.C. government had always favored increasing reimbursement rates[12] and received the necessary *political* impetus to do so because of the favorable publicity generated by the boycott.[13] (Indeed, if the government had been coerced into raising the rates, it could have brought an action for damages against the SCTLA. Its failure to bring such a suit strongly suggests that its action was voluntary.)

If the Court is not convinced that market power was absent based on the existing record, it should remand for further factual development. As we discuss in greater detail below (at 30), the FTC has at this point fallen far short of proving that the Trial Lawyers had any market power at all. See also Pet. App. 53a-57a.

As for the question of motivation, it is clear—as the court of appeals acknowledged (Pet. App. 43a)—that the Trial Lawyers were motivated at least in part by selfless concerns. The record is uncontroverted that these attorneys believed that higher rates of compensation would result in better service for indigent defendants

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[11] See J.A. 121-122 (testimony of Francis Carter), 375 (Isbell testimony).

[12] See, *e.g.*, J.A. 174, 176, 187 (Perotta testimony), 208, 217-218, 222 (Koskoff testimony), 249 (Addison testimony), 302 (Pickering testimony), 382 (Isbell testimony). Indeed, as the New York Times reported, "[t]he unusual thing about the lawyers' planned job action is that almost no one disagrees with their argument." J.A. 900.

[13] See J.A. 185-187 (Perotta testimony), 363-365 (testimony of Sterling Tucker), 399 (Isbell testimony), 497-498 (Perotta investigational hearing).

and that a boycott would help achieve that end.[14] Several state courts have emphasized that the quality of legal representation is directly related to the adequacy of compensation. See, *e.g.*, *White* v. *Board of County Comm'rs*, 537 So. 2d 1376, 1380 (Fla. 1989); *Jewell* v. *Maynard*, No. 18320, slip op. 16-17 (W. Va. Apr. 26, 1989); see also *Kansas ex rel. Stephan* v. *Smith*, 242 Kan. 336, 747 P.2d 816 (1987); J.A. 322-323, 327 (testimony of Professor Geoffrey Hazard). When the evidence indicating that the Trial Lawyers' success was due to persuasion, not coercion, is viewed in conjunction with the evidence that these attorneys did have a strong—if not predominant—unselfish motivation, it is clear that their boycott was political, not commercial in nature.

D. Construing The *Noerr* Doctrine To Immunize Non-Coercive Expressive Boycotts Will Not Hamper Antitrust Enforcement

Providing *Noerr* protection to boycotts aimed at the government will not have the apocalyptic effects of which the FTC complains (Br. 20). For one thing, such conduct is relatively rare and the Commission has provided no indication that the decisions of other courts according *Noerr* protection to expressive boycotts[15] have resulted in any increase in commercial boycotts masquerading as political ones. The Commission admits as much. See Br. 33. If the Court adopts a rule requiring inquiry into market power and motivation, there is even less cause for

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[14] See J.A. 157, 160 (Perotta testimony), 236-239 (Koskoff testimony, 263, 266-267 (Slaight testimony), 497-498 (Perotta investigational hearing), 504-505 (Addison investigational hearing), 553-560 (SCTLA document entitled *Representing The Poor: Criminal Injustice And Effective Representation*), 826-830 (SCTLA's prepared statement in support of legislation to increase reimbursement rates), 871 (Perotta testimony before D.C. Council Judiciary Committee), 941 (WTTG Television interview with Abe Blitzer).

[15] See, *e.g.*, *NOW*, *supra*; *Crown Central Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759 (M.D. Pa.), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980); *Claiborne Hardware*, 393 So. 2d at 1301.

concern that boycotts of the sort the antitrust laws were intended to prevent would be able to slip through the antitrust enforcement net. If the participants in a boycott have market power, they would not be entitled to *Noerr* immunity unless their predominant motive is a noncommercial one. If, on the other hand, they do not have market power, their actions should be of no concern to antitrust enforcement regardless of their motive because the boycott could not harm competition. See also pages 29-30 note 17, *infra*.

To be sure, it would be easier for the Commission to have at its disposal a rule excluding all boycotts from *Noerr* protection. But refusing to acknowledge a *per se* rule of exclusion will not result in any diminution of the Commission's authority to regulate *commercial* boycotts. The only result will be the protection of the small number of boycotts that are *political* in nature.

II. THE FIRST AMENDMENT BARS THE IMPOSITION OF ANTITRUST LIABILITY FOR THE TRIAL LAWYERS' BOYCOTT ABSENT PROOF THAT THE TRIAL LAWYERS POSSESSED MARKET POWER

Even if the *Noerr* doctrine does not apply to the Trial Lawyers' boycott, the judgment of the FTC cannot stand. As the court of appeals pointed out (Pet. App. 46a), the boycott had a substantial expressive element and therefore, under *United States* v. *O'Brien*, 391 U.S. 367 (1968), "the scope of [any regulation of that boycott] must be limited lest the incidental restriction of the participants' First Amendment freedoms be greater than is essential to further the [government's] interest in maintaining competition." The FTC's "condemnation without proof that the boycott could in fact be anticompetitive ignores the command of *O'Brien* that restrictions on activity protected by the First Amendment be '*no greater than is essential*' to preserve competition from the sclerotic effects of combination." Pet. App. 49a (emphasis in original).

The FTC attacks the court of appeals' common sense approach on two grounds. First, it argues (Br. 25-26) that the attempt to regulate the SCTLA's boycott does not even implicate the *O'Brien* test. Second, it contends (Br. 28-40) that even if *O'Brien* does apply, that standard does not require proof of market power as a prerequisite to the imposition of liability under the antitrust laws. The FTC is wrong on both scores.

A. The Boycott Constitutes Expressive Conduct Protected By The First Amendment

This Court has made clear that "when 'speech' and 'non-speech' elements are combined in the same course of conduct," that conduct is entitled to substantial protection under the First Amendment. *O'Brien*, 391 U.S. at 376-377. Although there can be no dispute that the SCTLA's boycott contained expressive elements, the FTC nonetheless contends that the *O'Brien* standard should not apply. The Commission argues (Br. 26)—without explanation—that the boycott was not protected speech despite its expressive content. The Commission further asserts (*ibid.*) that the *Noerr* doctrine and this Court's holding in *Claiborne Hardware* "give substantial protection to 'expressive' activity that might otherwise fall within the broad language of the antitrust laws" and that therefore "superimposing" the *O'Brien* standard onto these existing doctrines represents an overaccommodation of free speech interests. These arguments are wholly unpersuasive.

1. The suggestion that the SCTLA's boycott was not adequately expressive to qualify for any First Amendment protection at all is flatly at odds with the record and this Court's precedents. The Court only recently reiterated that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Court has] asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who

viewed it.'" *Texas* v. *Johnson*, No. 88-155, slip op. 6 (June 21, 1989) (quoting *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974)). There can be no question that the SCTLA's boycott meets that test. As the court of appeals said:

> the "factual context" of the SCTLA boycott suggests that the participants intended to communicate a message regarding the prevailing CJA rates and that this message was understood by others. [The SCTLA's members] actively courted media coverage of their "strike" by handing out press kits and organizing picket lines and rallies. The media responded with a number of newspaper articles and television stories that not only reported the boycott but also served to publicize [the SCTLA's] claims that the prevailing CJA rates were inadequate.

Pet. App. 47a (citation omitted).

Indeed, the decision in *Claiborne Hardware* is dispositive of this question. The boycott at issue in that case contained several elements—including speeches, nonviolent picketing, assembly, exhortations to others to join the boycott, and publicizing the names of nonparticipants—that are by themselves entitled to First Amendment protection. 458 U.S. at 907-911. This Court held that the boycott—the agglomeration of all of these elements—could be regulated only if the requirements of *O'Brien* were met. *Id.* at 912. Because the SCTLA's boycott, like the one in *Claiborne Hardware*, was accompanied by speeches, nonviolent picketing, assembly, exhortations to others to join the boycott, rallies, dissemination of media kits, press interviews, and other First Amendment activity, applying the *O'Brien* standard here is not only appropriate, but required by "a straightforward application of controlling precedent." See *Thigpen* v. *Roberts*, 468 U.S. 27, 33 (1984).[16]

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[16] The Commission bases its contrary conclusion on the fact that some economic regulations have been upheld against First Amendment challenge even though those regulations limited speech in a manner similar to the one at issue in this case. See Br. 27-28 &

2. The FTC's second argument—that applying *O'Brien* to the SCTLA's boycott would overaccommodate the First Amendment interests at stake here—is also flawed. The Commission's apparent view that *Noerr* and *Claiborne Hardware* leave no room for *O'Brien* rests on a gross misunderstanding of the relationship between the principles set forth in the three decisions.

To begin with, the *Noerr* doctrine is rooted in the statute itself, not in the Constitution. 365 U.S. at 132 n.6, 136-138. While *Noerr* is designed to avoid a collision between the Sherman Act and the First Amendment—and the contours of *Noerr* immunity for that reason may often parallel the relevant constitutional rules—there is no reason that *Noerr* and *O'Brien* should not exist side by side. Indeed, the claim that *Noerr* shuts the door on *O'Brien* attributes to Congress the power to limit the applicability of the First Amendment. There is no basis for leaving some First Amendment activity—that which implicates the antitrust laws but does not qualify for *Noerr* immunity—without any constitutional protection whatever.

The Commission's argument with respect to *Claiborne Hardware* and *O'Brien* is also defective. These decisions do not prescribe alternative forms of analysis; rather, *Claiborne Hardware* is the application in one particular context of the general rule set forth in *O'Brien*. Indeed, the Court in *Claiborne Hardware* cited *O'Brien* (see 458 U.S. at 912 & n.47) and concluded that the award of tort damages could not stand because it was not "tailored to

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n.21 (citing, *e.g.*, *International Longshoremen's Ass'n* v. *Allied International, Inc.*, 456 U.S. 212 (1982)). But the cases cited by the Commission do not suggest that the First Amendment was not implicated by these government regulations, only that the Amendment was not violated. The mere fact that different regulations adopted to further different government interests in different contexts were found not to violate the Constitution says nothing about how the First Amendment applies here. The same response applies to the Commission's rather far-fetched claim (Br. 38-39) that rejection of its position here would cast doubt on the validity of statutes barring strikes by government employees.

the consequences of [the] unlawful conduct" (458 U.S. at 926). Nothing in *Claiborne Hardware* indicates that the decision in that case was intended to describe fully the extent to which the First Amendment limits government regulation of boycotts. The Court there simply addressed one particular fact situation; it did not indicate that *O'Brien* has no effect on *other* sorts of boycott regulations. The analysis of those issues accordingly remains open for the future.

B. Because The Commission Did Not Show That The SCTLA Possessed Market Power, Its Regulation Of The SCTLA's Boycott Was Not Narrowly Tailored To The Government's Legitimate Interest In Antitrust Enforcement

The Commission's condemnation of the SCTLA's boycott was predicated upon the principle that boycotts constitute *per se* violations of the antitrust laws and that individuals and groups that participate in a boycott may therefore be penalized without regard to whether the boycott actually harmed competition, *i.e.*, whether the participants actually had market power and whether the boycott's anticompetitive aspects actually outweighed its procompetitive aspects. Pet. App. 48a. Because the SCTLA's boycott constituted expressive conduct, however, the FTC's application of the *per se* rule can survive First Amendment scrutiny only

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. There is no question that application of the *per se* rule to the Trial Lawyers' boycott passes muster under the first three prongs of the O'Brien test. The issue here is whether use of the *per se* rule in this context is "essential to the furtherance" of the government's concededly legitimate interest in antitrust enforcement.

In order to satisfy this prong of the *O'Brien* test, condemnation of expressive boycotts under the antitrust laws must be "narrowly tailored" to serve a substantial governmental interest and may "not 'burden substantially more speech than is necessary to further' " that interest. *Board of Trustees of the State Univ. of New York* v. *Fox*, No. 87-2013, slip op. 8 (June 29, 1989) (quoting *Ward* v. *Rock Against Racism*, No. 88-226, slip op. 16 (June 22, 1989)). As the court of appeals held (Pet. App. 48a-51a), application of the *per se* rule to expressive boycotts is impermissible under this standard.

The *per se* rule is simply a rule of administrative convenience. It "avoid[s] a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct." *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 15 n.25 (1984); see also *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). Because the *per se* rule establishes a conclusive presumption that all agreements falling within certain broad categories violate the antitrust laws, some agreements that do not actually restrain trade inevitably will be subject to punishment. See *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982) ("[a]s in every rule of general application, the match between the presumed and the actual is imperfect"). In the run-of-the-mill concerted refusal to deal case, sacrificing accuracy "[f]or the sake of business certainty and litigation efficiency" (*ibid.*) is entirely acceptable. Regulations affecting only economic rights withstand constitutional scrutiny so long as they are rationally related to a permissible governmental interest. See, *e.g.*, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938).

When First Amendment rights are involved, however, the standard is far stricter. "Where political expression or association is at issue, this Court has not tolerated

the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *In re Primus*, 436 U.S. 412, 434 (1978). A regulatory technique that restricts protected conduct "may extend only as far as the interest it serves." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 565 (1980).

Penalizing expressive boycotts without any indication that they have the potential to harm competition is not an approach narrowly tailored to serve the government's interest in prohibiting anticompetitive activity; it burdens substantially more speech than is necessary to further that interest. See *Frisby* v. *Schultz*, 108 S.Ct. 2495, 2502 (1988) (a regulation "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"). The government's interest can be accommodated fully—with a substantially reduced burden on First Amendment rights—by condemning only those expressive boycotts that actually have the potential to harm competition.

A boycott that lacks market power cannot harm competition. As the court of appeals explained, "the market power requirement generally serves to ensure that the antitrust laws do not interfere with business arrangements that could not actually exert any detrimental effect on competition." Pet. App. 48a; see also *Northwest Wholesale Stationers*, 472 U.S. at 296. The FTC did not inquire whether the SCTLA possessed market power and therefore did not determine whether the boycotters "could * * * actually [have] exert[ed] any detrimental effect on competition." Its condemnation of the boycott accordingly cannot be said to be narrowly tailored to serve the government's interest in antitrust enforcement.

The FTC does not dispute that the *per se* rule sometimes ensnares those who are powerless to harm competition and that individuals attempting to exercise their First Amendment rights might be among these hapless victims. Rather, it contends (Br. 31) that "efficiency in achieving important governmental purposes is itself a

substantial governmental interest" that justifies using the *per se* rule in all boycott cases even if that approach does trench more deeply on First Amendment rights. That argument misses the mark for several reasons.

The contention that efficiency is a substantial interest in its own right is incorrect. As this Court recently explained, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *National Fed'n of the Blind, Inc.*, 108 S. Ct. 2667, 2676 (1988); *cf. Bowen* v. *Roy*, 476 U.S. 693, 730-31 (1986) (O'Connor, J., concurring and dissenting) (administrative efficiency does not justify burden on First Amendment free exercise of religion). The obvious question is: efficiency in accomplishing what end? The weight to be accorded to a claim of efficiency depends on the cost—in terms of harm to the government's interest—of using an alternative that is less burdensome on First Amendment rights.

The cases upon which the FTC relies are not to the contrary. *United States* v. *Albertini*, 472 U.S. 675 (1985), merely holds that the military is entitled to use the most effective means available to prevent a *known* vandal from vandalizing military property and need not be relegated to less effective means that might better accommodate the vandal's First Amendment interests. *Abertini* does not hold that efficiency justifies incidental incursions on the First Amendment freedoms of individuals who have not been proven to pose any threat to military property. Similarly, *Clark* v. *Community for Creative Non-Violence ("CCNV")*, 468 U.S. 288 (1984), holds only that the Park Service need not make exceptions to its rule banning overnight camping in designated areas in order to accommodate the First Amendment interest of political protestors, who indisputably will do more damage to the grounds if they camp overnight than if they do not. CCNV does not hold that, in the name of convenience, the Park Service is entitled to enforce a broad regulation that bans some expressive conduct that has no harmful effect on park grounds.

This case is thus quite different from *Albertini* and *CCNV*. In those cases there was a proven danger to the government's interest and the methods chosen by the government to address that danger were more effective than alternatives that might better have accommodated First Amendment rights. Here, the FTC asks to be relieved of the burden of showing that there was any danger at all. Purely for efficiency's sake, it wants to penalize participants in expressive boycotts without showing that their activities threatened competition. Such an outcome is not required by *Albertini* and *CCNV* and is not consistent with this Court's repeated warning that the government may not sacrifice speech on the altar of efficiency.

Indeed, this Court has made clear that efficiency is "not sufficient [by itself] to justify the creation of *per se* rules. If it were otherwise, all of the antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law." *Sylvania*, 433 U.S. at 50 n.16. Accordingly, the Court has limited the *per se* rule to conduct that by its very nature lacks any redeeming virtue, refusing to subject various kinds of concerted activities to *per se* condemnation. See, *e.g.*, *Northwest Wholesale Stationers*, *supra*; *National Collegiate Athletic Ass'n* v. *Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984); *BMI*, *supra*; *Sylvania*, *supra*. See also page 16 note 9, *supra*. The Court has been particularly emphatic in rejecting the notion that all concerted refusals to deal are subject to the *per se* rule, stating that courts need to show "care in application" of the rule lest concerted refusals to deal that are "characteristically [un]likely to result in predominantly anticompetitive effects" be unnecessarily penalized. *Northwest Wholesale Stationers*, 472 U.S. at 298, 295. Because efficiency cannot justify indiscriminately applying the *per se* rule to every kind of concerted activity, it cannot justify refusing to deviate from the *per se* rule where application of that rule conflicts with First Amendment values.

Finally, the Commission has substantially overstated the extent to which requiring proof of market power as a prerequisite to condemnation of expressive boycotts will affect antitrust enforcement. The market power requirement does not deprive the government of the ability to punish wrongdoing and does not keep the government from presenting relevant evidence that might be critical to its case. The FTC will lose no more than an "evidentiary shortcut." Pet. App. 50a. It can continue to enforce the antitrust laws as rigorously as it sees fit, but—at least where expressive boycotts are concerned—it must "prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns." Pet. App. 51a.

Such a requirement is not at all unusual. The government must demonstrate market power in any number of contexts, including, most obviously, monopolization and merger cases. Moreover, this Court has—as a matter solely of antitrust law—sometimes required a showing of market power as a prerequisite to application of the *per se* rule. See, *e.g.*, *Northwest Wholesale Stationers, supra; Jefferson Parish, supra; Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958). Because the government already bears the burden of proving market power in a vast number of situations, the addition of a few more cases in which it does not enjoy the benefits of a conclusive presumption of competitive harm is hardly likely to prove disastrous.[17]

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[17] The FTC's concern that imposing a market power requirement in this case will virtually eliminate the *per se* rule in boycott cases generally (Br. 32-35, 42-43) is, as the court of appeals observed, "hysterical." Pet. App. 50a. As we have discussed (at 22), the SCTLA's boycott was pregnant with expressive content. We doubt that courts will have much difficulty distinguishing boycotts like the SCTLA's from run-of-the-mill competitor boycotts that contain no speech element at all (see *Klor's*, *supra*) or only a sham speech element. Moreover, to the extent that a boycott contains bona fide

III. THE FTC CANNOT CARRY ITS BURDEN OF PROVING MARKET POWER SIMPLY BY POINTING TO THE SUCCESS OF THE BOYCOTT

The FTC argues (Br. 40-45) that even if it must prove that the SCTLA possessed market power, the record contains sufficient evidence to establish that fact. It contends that the remand ordered by the court of appeals is unnecessary because the very fact that the D.C. government increased reimbursement rates proves that the SCTLA had market power. As the court of appeals pointed out, however (Pet. App. 53a-55a), this contention is far too facile. The very reason for inquiring into market power in the first place is to determine whether the success of the boycott was the result of political persuasion or economic coercion. Allowing the Commission to rely on the fact of success alone would defeat the entire purpose of the inquiry. Rather than distinguishing between political persuasion and economic power, the Commission's approach would allow the application of the *per se* rule to every successful boycott, even those wholly political in nature. This rather transparent attempt to circumvent the protections of *Noerr* and the First Amendment cannot succeed.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part, and the case remanded with directions to dismiss the complaint.

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expressive elements, we see no reason why the FTC should be entitled to condemn it absent a showing of market power. Hence, we do not view the FTC's parade of horribles (Br. 33-35) as being very horrible at all. If physicians boycott Medicaid patients as a means of expressing their disagreement with low reimbursement rates, the FTC can punish them so long as it proves that they have the power to do competitive harm. If they have no such power, then the FTC should not be entitled to condemn their expressive conduct.

Respectfully submitted.

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